

DATE: October 29, 2007

In re:

SSN: -----

Applicant for Security Clearance

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) ISCR Case No. 07-02082
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**DECISION OF ADMINISTRATIVE JUDGE
JUAN J. RIVERA**

APPEARANCES

FOR GOVERNMENT

Alison O'Connell, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant was born in the United States. His father was a U.S. Army soldier assigned to Germany who retired in Germany after 24 years of service. His mother is a German citizen. Applicant grew up and was educated as a German citizen. He is 30 years old and has lived the last 24 years of his life exercising the rights, privileges, and obligations of a German citizen. Applicant's ties and connections to Germany are stronger than his ties and connections to the United States. His favorable information is not sufficient to mitigate the foreign influence and foreign preference security concerns. Clearance is denied.

STATEMENT OF THE CASE

On May 30, 2007, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) alleging facts and security concerns under Guideline B (Foreign Influence), and Guideline C (Foreign Preference). The SOR informed Applicant that based on available information, DOHA adjudicators could not make a preliminary affirmative finding that it is clearly consistent with the national interest to grant him access to classified information and submitted the case to an administrative judge for a security determination.¹ On June 27, 2007, Applicant answered the SOR and requested a hearing.

Applicant is a resident of Germany. During the week of August 20, 2007, Applicant and department counsel attempted to schedule Applicant's hearing in the United States to correspond with Applicant's scheduled training trip to the United States. However, the training was cancelled. The case was assigned to me on August 29, 2007. On or about September 4, 2007, Applicant elected to have his hearing conducted via video tele-conference (VTC). On September 19, 2007, a Notice of Hearing was issued convening a VTC hearing on September 26, 2007.² The hearing was convened as scheduled. The government presented one exhibit, marked GE 1, to support the SOR. At his hearing, Applicant testified on his own behalf and presented the testimony of one witness (no exhibits). DOHA received the transcript on October 4, 2007.

FINDINGS OF FACT

Applicant admitted all the allegations under Guidelines B and C, except for ¶ 1.c, which he denied. His admissions are incorporated herein as findings of facts. After a thorough review of Applicant's testimony and the record evidence, I make the following additional findings of facts.

Applicant's father was born in the United States. He enlisted in the U.S. Army in February 1973, and sometime thereafter, was assigned to Germany. While in Germany, he met and married Applicant's mother, a German citizen. Later, his father was reassigned to a base in the United States, where Applicant was born in June 1977. His sister was also born in the United States in 1982 (Tr. 27, 29).

In 1983, when Applicant was approximately six years old, the Army reassigned his father back to Germany. Applicant's father served in the U.S. Army in Germany until he retired in March 1997. After his retirement, he was hired by an American company providing support to the Army in Germany.

¹ See Executive Order 10865, *Safeguarding Classified Information Within Industry* (Feb. 20, 1960, as amended, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992) (Directive), as amended. On August 30, 2006, the Under Secretary of Defense (Intelligence) published a memorandum directing application of revised adjudicative guidelines (AG) to all adjudications and other determinations made under the Directive in which the SOR was issued on or after September 1, 2006.

² Applicant had sufficient time to prepare for his hearing and was ready to proceed. I find he had more than 15 days notice of his hearing. Furthermore, he affirmatively waived his right under the Directive to have 15 days hearing notice.

Applicant considers himself a citizen of Germany and the United States (Tr. 28, 69). He was raised and educated within the German culture. As a German citizen, he attended German schools free of charge (Tr. 35). In 1997, he completed the equivalent of a junior college education. In September 1997, he was conscripted into the German Army where he served until June 1998. After his discharge from the German Army, Applicant underwent three and one-half year of apprenticeship as an industrial electronics technician (Tr. 38-41). From September 1998 to February 2004, Applicant worked for at least four different German companies and had several periods of unemployment. He received unemployment benefits from the German government during his periods of unemployment. In February 2004, Applicant was hired as a training technician by his current employer, the same U.S. defense contractor that employs his father and provides support for U.S. troops in Germany (Tr. 49).

As a German citizen, Applicant contributes to the German health care and insurance system, to his retirement plan, unemployment benefits, and church tax. He is allowed to vote in German elections, however, he has never done so (Tr. 55-57). Applicant is single and has no children. He lives in the German economy with his German girlfriend, whom he would like to marry in the near future. He has a German bank account and a \$2,000 car note. Applicant does not have a German passport. He does have, however, a German citizen identification card that allows him to travel throughout the countries within the European Union (EU). In 2005-2006, he traveled to Tunisia using his German citizen identification card. He also has a U.S. passport which he has used to travel to countries outside of the EU (Tr. 50-51).

Applicant believes there is no practical reason for him to renounce his German citizenship (Tr. 28). After leaving the United States at age six, he visited the United States one time for his grandfather's funeral. He never registered with the U.S. Selective Service System. He has no property, business, or financial interests in the United States. Applicant's sister is married to a U.S. soldier. She was living in the United States with her husband until he was deployed to Iraq. She is currently living with her parents in Germany waiting for her husband's return.

Applicant testified that although his mother is German, he has stronger ties to the United States than to Germany because he was born in the United States, his father was an American soldier, and his sister is married to a U.S. soldier. He explained he has remained in Germany because he does not have the resources to travel and begin a new life in the United States (Tr. 37). He has only one friend in the United States, a dual citizen who recently returned to the United States. Except for this friend, all of Applicant's friends are citizens and residents of Germany.

POLICIES

The Directive sets forth adjudicative guidelines (AG) which must be considered in evaluating an Applicant's eligibility for access to classified information. The administrative judge must take into account both disqualifying and mitigating conditions under each AG applicable to the facts and circumstances of the case. The guidelines are not viewed as inflexible ironclad rules of law. The presence or absence of a disqualifying or mitigating condition is not determinative of a conclusion for or against an Applicant. Each decision must reflect a fair and impartial common sense

consideration of the factors listed in Section 6.3 of the Directive, and the whole person concept.³ Having considered the record evidence as a whole, I conclude Guideline B (Foreign Influence) and Guideline C (Foreign Preference) are the applicable relevant AGs.

BURDEN OF PROOF

The purpose of a security clearance decision is to determine whether it is clearly consistent with the national interest to grant or continue an applicant's eligibility for access to classified information.⁴ A person who has access to classified information enters into a fiduciary relationship with the government based on trust and confidence. The government, therefore, has a compelling interest to ensure each applicant possesses the requisite judgement, reliability and trustworthiness of one who will protect the national interests as his or her own.

The government has the initial burden of proving controverted facts alleged in the SOR. To meet its burden, the government must establish by substantial evidence⁵ a *prima facie* case that it is not clearly consistent with the national interest for the applicant to have access to classified information. The responsibility then shifts to the applicant to refute, extenuate or mitigate the government's case. Because no one has a right to a security clearance, the applicant carries a heavy burden of persuasion.⁶ The "clearly consistent with the national interest" standard compels resolution of any reasonable doubt about an applicant's suitability for access to classified information in favor of protecting national security.⁷

The scope of an administrative judge's decision is limited. Nothing in this Decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied determination as to Applicant's allegiance, loyalty, or patriotism. Executive Order 10865, § 7.

CONCLUSIONS

³ AG ¶ 2(a). "... The adjudication process is the careful weighing of a number of variables known as the whole person concept. Available, reliable information about the person, past and present, favorable and unfavorable, should be considered in reaching a determination. . . ." The whole person concept includes the consideration of "the nature, extent, and seriousness of the conduct; the circumstances surrounding the conduct, to include knowledgeable participation; the frequency and recency of the conduct; the individual's age and maturity at the time of the conduct; the extent to which participation is voluntary; the presence or absence of rehabilitation and other permanent behavioral changes; the motivation for the conduct; the potential for pressure, coercion, exploitation, or duress; and the likelihood of continuation or recurrence. . . ."

⁴ See *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).

⁵ ISCR Case No. 98-0761 at 2 (App. Bd. Dec. 27, 1999)(Substantial evidence is more than a scintilla, but less than a preponderance of the evidence); ISCR Case No. 02-12199 at 3 (App. Bd. Apr. 3, 2006)(Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the record); Directive ¶ E3.1.32.1.

⁶ *Egan*, *supra* n. 4, at 528, 531.

⁷ See *id.*; AG ¶ 2(b).

Under Guideline B (Foreign Influence), the government's concern is that foreign contacts and interests may be a security concern. If the individual has divided loyalties or foreign financial interests, he or she may be manipulated or induced to help a foreign person, group, organization, or government in a way that is not in U.S. interests, or is vulnerable to pressure or coercion by any foreign interest. Adjudication under this Guideline can and should consider the identity of the foreign country in which the foreign contact or financial interest is located, including, but not limited to, such considerations as whether the foreign country is known to target United States citizens to obtain protected information and/or is associated with a risk of terrorism. AG ¶ 6.

AG ¶ 7 sets out conditions that could raise a security concern and may be disqualifying. In this case, the most pertinent is:

(b) connections to a foreign person, group, government, or country that create a potential conflict of interest between the individual's obligation to protect sensitive information or technology and the individual's desire to help a foreign person, group, or country by providing that information.

Applicant's ties and connections to Germany are stronger than his ties and connections to the United States. His connections to the United States are summarized as follow: his father is an American, Applicant was born in the United States, he has a U.S. passport, his sister is married to a U.S. soldier, and he works for an American company. Applicant has no other connections to the United States. On the other hand, Applicant's connections to Germany are substantial. He has lived in Germany since age six, and was raised and educated as a German citizen. He served in the German Army (albeit as a conscript and for 10 months), and all of his financial/economic interests are in Germany. Applicant's girlfriend and almost all his friends are Germans. Additionally, Applicant has received benefits reserved for German citizen such as a German identification card, and educational and unemployment benefits. He also contributes financially and is entitled to benefits from the German welfare, medical, and retirement systems.

The government produced substantial evidence raising the potentially disqualifying condition, and the burden shifted to Applicant to produce evidence and prove a mitigating condition. The burden of disproving a mitigating condition never shifts to the government.

Two foreign influence mitigating conditions under AG ¶ 8 are potentially applicable to the disqualifying condition:

(a) the nature of the relationships with foreign persons, the country in which these persons are located, or the positions or activities of those persons in that country are such that it is unlikely the individual will be placed in a position of having to choose between the interests of a foreign individual, group, organization, or government and the interests of the U.S.;

(b) there is no conflict of interest, either because the individual's sense of loyalty or obligation to the foreign person, group, government, or country is so minimal, or the individual has such deep and longstanding relationships and loyalties in the U.S., that the individual can be expected to resolve any conflict of interest in favor of the U.S. interest; and

I note that Germany is an open society, governed as a freely-elected democratic republic, with a representative legislature, a periodically-elected chancellor as the executive leader, and an independent judiciary. Germany is not known to engage in human rights abuses or other oppressive conduct towards its citizenry. While it differs, as allies sometimes do, with the United States on a number of issues, Germany has, since 1945, generally aligned itself with U.S. foreign policy, military, and commercial interests. As such, I believe it would be unlikely that Applicant will be placed in a position (by force or pressure) of having to choose between the interests of a foreign individual, group, organization, or the German government and the interests of the U.S., and AG ¶ 8(a) applies.

Notwithstanding, Applicant's favorable information is not sufficient to warrant the applicability of AG ¶ 8(b). Applicant has not established a sufficient relationship and loyalty to the United States, to show that he can be expected to resolve any conflict of interest in favor of the United States' interest. As mentioned above, his connections to Germany are stronger than his connections to the United States. Applicant has lived most of his life as a German citizen. All of his financial and business interests are in Germany, and he has embraced the German way of life.

Under Guideline C (Foreign Preference), the government's concern is that when an individual acts in such a way as to indicate a preference for a foreign country over the United States, then he or she may be prone to provide information or make decisions that are harmful to the interests of the United States.

Applicant considers himself a dual citizen of the United States and Germany. His home is in Germany where he has lived since age six, and where he was raised and educated as a citizen. He served in the German Army, and all of his financial/economic interests are in Germany. Applicant's girlfriend and almost all his friends are Germans. Applicant has received benefits reserved for German citizens such as a German identification card, a free education, and unemployment benefits. He also contributes to the German welfare, medical, and retirement systems, and is entitled to those benefits. His actions constitute an exercise of dual citizenship and raises security concerns under Guideline C. Foreign preference disqualifying condition AG 10(a): *exercise of any right, privilege or obligation of foreign citizenship after becoming a U.S. citizen or through the foreign citizenship of a family member. This includes . . . (2): military service . . . for a foreign government; and (3): accepting educational, medical, retirement, social welfare, or other such benefits from a foreign government, apply.*

After considering the totality of the facts and circumstances in Applicant's case, I conclude that none of the mitigating conditions under AG ¶ 11 apply. Applicant's security concerns arose out of his exercise of the rights, privileges, and obligations of a German citizen. His German citizenship is not based solely on his mother's citizenship. He has not offered to renounce his German citizenship. He has willingly and knowingly exercised his rights as a German citizen since age 18.

I have carefully weighed all evidence, and I applied the disqualifying and mitigating conditions as listed under the applicable AGs. I specifically considered Applicant's and his father's testimony. I considered his father's 24 years of honorable, military service to the United States, that as a child, Applicant had no choice but to be with his parents, and that he has remained in Germany because his father's military service and retirement in Germany. Considering all available

information, and the whole person concept, I find Applicant's available information is not sufficient to mitigate the foreign influence and foreign preference security concerns.

FORMAL FINDINGS

Formal findings regarding each SOR allegation as required by Directive Section E3.1.25 are as follows:

Paragraph 1, Foreign Preference	AGAINST APPLICANT
Subparagraphs 1.a-1.b, & 1.d:	Against Applicant
Subparagraph 1.c:	For Applicant
Paragraph 2, Foreign Influence	AGAINST APPLICANT
Subparagraphs 1.a -1.b	Against Applicant

DECISION

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. Clearance is denied.

Juan J. Rivera
Administrative Judge